STATE OF MICHIGAN

COURT OF APPEALS

LAETHEM EQUIPMENT COMPANY, LAETHEM FARM SERVICE COMPANY, and CANUSA EQUIPMENT COMPANY,

Plaintiffs/Counter-Defendants-Appellants/Cross-Appellees,

v

J & D IMPLEMENT, INC.,

Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellee/Cross-Appellant,

and

FRANCIS M. LAETHEM LIVING TRUST, KATHRYN M. LAETHEM, TRUSTEE, and LAETHEM LAND COMPANY, LLC,

Third-Party Defendants.

UNPUBLISHED
July 19, 2007

No. 266648
Tuscola Circuit Court
LC No. 05-022863-CK

Before: Davis, P.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition to defendant. Defendant purports to cross-appeal, but in fact only asserts an alternative ground for affirmance.[1] We find that the grant of summary disposition was erroneous, and the asserted alternative basis is without merit. We therefore reverse and remand.

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[1] The ground asserted by defendant was not addressed by the trial court. However, even if it had actually been rejected by the trial court, "[a] cross appeal [i]s not necessary to urge an 'alternative ground for affirmance.'" *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994).

The instant litigation arises out of considerable history and a prior lawsuit. On January 4, 1993, Francis M. Laethem, then the sole owner of plaintiffs Laethem Equipment Company (LEC), Laethem Farm Service Company (LFSC), Canusa Equipment Company (Canusa) (collectively, the "Laethem businesses"), died testate. Pursuant to his estate plan, the Laethem businesses were placed into the Francis M. Laethem Living Trust. The Trust named three of Francis's children, Mark, Michael, and Kathryn Laethem, as trustees. The Trust provided for "disinterested" and "interested" trustees. Although the Trust did not explicitly name Kathryn as the disinterested trustee, it clearly indicates that she was, and it is also clear from the record that all relevant parties also regarded her as the "disinterested trustee." The Trust likewise indicates that Mark and Michael were "interested trustees." The Trust provided that the "Settlor's spouse," Anne Laethem, could remove a disinterested trustee after naming a replacement.

At the time of Francis's death, Mark and Michael had been operating the Laethem businesses, and they continued to do so. The family members apparently had some discussions regarding Mark and Michael intending to purchase the Laethem businesses from the Trust. "Stock Purchase Agreements" were executed for the sale of Canusa and LEC; they were made between Mark and Michael in their roles as trustees and Mark and Michael in their roles as individuals, and they were witnessed by Anne.[2] Kathryn, acting as the Laethem businesses' certified private accountant, submitted yearly tax returns starting in 1994, indicating that Mark and Michael were sole co-owners of the Laethem businesses. Between 1994 and 2001, Mark and Michael apparently secured several dealership franchises for the Laethem businesses, among other activities.

In 2001, Kathryn began raising objections to the business arrangements, and Mark and Michael attempted to negotiate a resolution. On October 15, 2001, Anne executed a document formally stating that she was removing Mark and Michael as trustees. Kathryn proceeded to act as sole trustee thereafter. On October 21, 2001, Kathryn removed Mark and Michael from their positions as officers and directors of the Laethem businesses. Mark and Michael apparently continued to be employed by the Laethem businesses and continued to conduct some of those businesses' operations. In the complaint in the underlying suit, Mark and Michael alleged that Kathryn did not actually tell them that they were no longer officers or directors, but that between late 2001 and late 2002, Kathryn informed a number of other creditors, financers, and franchisers that the Laethem businesses were insolvent or that Mark and Michael were no longer officers or directors or permitted to endorse corporate checks. On January 15, 2003, during a business meeting at the Laethem businesses' offices and involving Mark, Michael, and representatives from John Deere, Kathryn arrived with police and armed guards, terminated Mark and Michael's employment, and had them removed from the premises. Mark and Michael submitted a final offer to purchase the businesses; they then filed the complaint in the underlying suit on February 18, 2003.

[2] Plaintiffs concede that these transactions were poorly documented, and an alleged purchase of LFSC was not documented at all.

The parties have only provided us with a few scattered excerpts from the underlying action. Mark and Michael alleged that Kathryn terminated most of the employees of the Laethem businesses and shut down most of their operations. Of particular significance to this case, on February 27, 2003, the trial court entered a temporary restraining order concluding "that unless the Court restrains Defendants[3] from selling or liquidating assets, Plaintiffs may suffer irreparable harm;" therefore "Defendants are restrained from selling, encumbering, liquidation [sic] or otherwise disposing of assets outside of the ordinary course of business." The next day, on February 28, 2003, Kathryn executed an "Asset Purchase Agreement" between J&D Implement, Inc. (defendant in the instant action) as the buyer, LEC as the seller, and the Trust. The only Laethem business that was a party to the agreement was LEC; none of the other Laethem businesses were mentioned anywhere in the agreement. Kathryn signed the agreement both in her capacity as President of LEC and as the Trustee of the Trust, notwithstanding the prior purchase of LEC by Mark and Michael. The agreement explicitly referred to the pending lower court Case No. 03-21644-CZ and the fact that Michael and Mark were plaintiffs therein. On the same day, Kathryn individually, as Trustee of the Trust, entered into a "Commercial Lease Agreement" with J&D; J&D was the "tenant," the Trust was the "landlord," and the term of the lease was to be three years, beginning on February 3, 2003. None of the Laethem businesses were mentioned at all except in a reference to the pending litigation.

On November 1, 2004, the trial court entered a default judgment in favor of Mark and Michael, finding that they "are now and have been since January 4, 1993," the 50/50 co-owners of the Laethem companies, with the rights to profit from and control the companies themselves; the court also found that Mark and Michael had been the 50/50 equitable co-owners of all of the Laethem companies' commercial real estate located in Caro, Michigan. The same day, the parties apparently placed a settlement agreement on the record. The parties to the underlying lawsuit signed the Settlement Agreement on December 14, 2004. Specifically, the settlement agreement provides that it is made "between Mark Laethem and Michael Laethem (Mark and Mike) on the one hand, and Kathryn Laethem, the Francis M. Laethem Trust (the Trust), and Anne Laethem, Nancy Laethem Stern, Joseph Laethem, Carol Starling and Mary Vinckier (collectively, the Mother and Remaining Siblings), on the other."

The instant action was commenced approximately one month later, on February 15, 2005, by the Laethem businesses themselves. According to the second amended complaint, J&D acquired "certain of LEC's assets" pursuant to the February 28, 2003, Asset Purchase Agreement for the sum of $50,000, when in fact the assets were worth more than a million dollars. J&D did not acquire any "non-John Deere parts" in the transaction, but J&D allegedly sold non-John Deere parts anyway and kept the proceeds. J&D also did not acquire any assets of LFSC or Canusa, but allegedly took or sold property belonging to both. Finally, J&D allegedly took confidential or proprietary information belonging to all three of the Laethem businesses, even though information was not part of the asset purchase transaction. Plaintiffs further alleged that defendant knew or had reason to know that the assets it had acquired from LEC were worth far

[3] "Defendants" at this point referred to the defendants in the prior litigation, Kathryn and the Trust.

more than what defendant paid for them, and furthermore defendant knew or had reason to know that Kathryn did not have the authority to execute the agreement on behalf of LEC.

The trial court granted summary disposition to defendant, holding that all of plaintiffs' claims derived from the February 28, 2003 agreements between J&D and LEC and executed by Kathryn at a time when Kathryn was fully authorized to do so. The trial court concluded that because Kathryn was properly authorized as sole trustee of the Trust to execute the agreements, the action was barred, so summary disposition was required under MCR 2.116(C)(7). The trial court further observed that when Mark and Michael received retroactive ownership of the businesses, they received the businesses' assets as they existed in December 2004. The trial court concluded that "LEC, LFSC, and Canusa cannot now rewrite history to undo this contract entered into by LEC and the Trust." The trial court deemed the rest of plaintiffs' claims derivative of issues arising out of the Asset Purchase Agreement or were or were premised on acts by Kathryn while she was acting in her capacity as president of LEC and trustee of the Trust.

J&D had filed a counter-complaint against plaintiffs and a third-party complaint against Kathryn and the Trust, essentially seeking indemnification; as a result of the trial court's grant of summary disposition in J & D's favor on plaintiffs' complaint, J & D sought to dismiss its counter-complaint and third-party complaint without prejudice. The parties stipulated to those dismissals, and the trial court granted the motion to dismiss without prejudice on November 1, 2005. This appeal followed.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the nonmoving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*., 120. Under MCR 2.116(C)(7), where the claim is allegedly barred, this Court considers any admissible documentary evidence supplied by the parties but otherwise treats the contents of the complaint as true. *Id*., 119. This Court also reviews de novo as a question of law the proper interpretation of a contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). The question whether res judicata bars a subsequent suit is a question of law that is reviewed de novo. *Pierson Sand and Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). Although the trial court did not address all the issues argued on appeal, they were all raised below, and an issue raised in the trial court and pursued on appeal is preserved for review. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

Defendant argued below, and argues on appeal, that the settlement agreement that terminated the prior litigation contained a comprehensive release that now precludes plaintiffs from bringing any claims against defendant. It is not clear to what extent the trial court relied on the release provisions of the settlement agreement, but the trial court did hold that Mark and Michael received whatever assets of the Laethem businesses happened to exist as of the date of the settlement agreement. We have analyzed the applicability of the settlement agreement, and we agree with plaintiffs. To the extent the trial court concluded that the Settlement Agreement that ended the underlying action constituted a release by any party against defendant J&D, or that

the a transfer in ownership of a corporation cuts off the corporation's ability to bring a claim on its own behalf for a harm sustained prior to the transfer in ownership, the trial court clearly erred.

The plain language of the settlement agreement unambiguously states in its first paragraph that the parties thereto *release each other* from claims. The same paragraph then goes on to explain that *this release* is to be complete, and *this completeness* includes "claims by or against any artificial entities." The only rational interpretation of the "by or against" language is that it was intended to preclude the parties to the agreement from bringing any claims against each other by any means.[4] The "by or against" language explains "this mutual release," which in turn references only Mark, Michael, Kathryn, the Trust, Anne, and the other Laethem siblings. Therefore, the agreement precludes a suit by any of the Laethem businesses – or even an entirely new entity under the control of Mark or Michael – against any of the parties to the underlying action based on anything that occurred prior to November 1, 2004. It does not preclude a suit by any natural or artificial entity against any other natural or artificial entity not a party to the agreement. It therefore does not preclude a claim by the instant plaintiffs against the instant defendant.

The trial court also erred in finding that the settlement agreement itself transferred any assets or conveyed ownership of the Laethem businesses. The settlement agreement only "acknowledges" that Mark and Michael are the owners of the Laethem businesses. An order was entered before the settlement agreement was entered into, setting forth the *finding* that Mark and Michael "are now and have been since January 4, 1993," the 50/50 co-owners of the Laethem companies. Furthermore, the Laethem businesses' assets would have always belonged to the Laethem businesses. Absent circumstances such as fraud or illegality, corporations are legally distinct entities from their shareholders, even if there is only a single owner. *Dep't of Consumer & Industry Services v Shah*, 236 Mich App 381, 393; 600 NW2d 406 (1999). So a transfer in ownership of the corporations would have no bearing on whether the corporations *themselves* had a cause of action for a harm the *corporation itself* suffered. See *OD Silverstein, MD, PC v Services, Inc*, 165 Mich App 355, 358-359; 418 NW2d 461 (1987) (holding that a corporation's obligations survive changes in the corporation's ownership). The trial court ignored this distinction when it reasoned that new owners of a corporation cannot bring an action, in their role as owners of the corporation and on behalf of the corporation, for a harm sustained by the corporation prior to the new owners' assumption of ownership.

The more important consideration is the significance of the Asset Purchase Agreement. Defendant argues that plaintiffs' own assertions establish that Kathryn was authorized to execute it: plaintiff's complaint averred that "On February 28, 2003, JD [sic] entered into an agreement

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[4] Defendant's interpretation would preclude any of the parties to the underlying action from suing *anyone* for any wrong they might have suffered prior to the date of the release. Defendant asserts that its construction would be rational because it would prevent the Laethem businesses from exposure to a countersuit by J&D. However, the agreement expressly contemplates at least the possibility of some kind of suit by J&D against the Laethem businesses. It also explicitly states that "[t]he parties acknowledge and agree that any claims or causes of action held by [the Laethem businesses] are the sole and exclusive property of those entities."

with LEC, which at the time was controlled by Kathryn Laethem, and with the Francis M. Laethem Trust, also controlled by Kathryn Laethem." Defendant asserts that Kathryn was the sole trustee of the Trust, and notwithstanding any later retroactive changes in ownership, she had full authority in her capacity as sole trustee to bind the Laethem businesses at the time of the Asset Purchase Agreement. However, a proper parsing of plaintiffs' complaint does not establish agreement that Kathryn was *authorized* to do anything, merely that she was "in control" of the Trust and of LEC. A primary issue in the prior litigation was whether Kathryn was authorized to act as she did. The settlement agreement provides that Kathryn was always *a* trustee, not that she was *the* trustee. The trust provisions authorized Anne to remove the *disinterested* trustee only, meaning she could only have removed Kathryn, not Mark or Michael. Even assuming, arguendo, that all three trustees were "disiniterested," they could only be removed after naming a successor, so her removal of Mark and Michael would still have been procedurally impermissible. Therefore, the Trust should not have permitted Kathryn to act as sole trustee, so her authority to bind the Trust or any trust-owned businesses to an agreement in that capacity was nonexistent.

Moreover, the trial court entered a temporary restraining order restraining Kathryn "from selling, encumbering, liquidation [sic] or otherwise disposing of assets outside of the ordinary course of business" the *day before* the Asset Purchase Agreement was entered into. Although this Court has not been provided with enough of the record from the prior proceedings to determine when or if the TRO was removed, it is highly unlikely that it would have been removed by the next day. The Asset Purchase Agreement apparently disposes of a significant portion of the Laethem businesses' assets and was an extraordinary transaction for the Laethem businesses. Therefore, the Asset Purchase Agreement must have been directly contrary to the order of the court. Also significantly, the Asset Purchase Agreement itself referenced the pending litigation by Mark and Michael against Kathryn. Therefore, J&D must have been aware of the existence of the pending litigation, and it should have been aware of the nature thereof, part of which was Kathryn's authority to act as sole trustee. Consequently, defendant's reliance on Kathryn's apparent authority to bind the Trust and to bind the Laethem businesses was misplaced.

Kathryn actually lacked authority to act as sole trustee of the Trust and to enter into the Asset Purchase Agreement in that role, she was under a court order not to engage in the kind of transaction represented by the Asset Purchase Agreement, and her apparent authority should have been clearly dubious. It is therefore unnecessary to further address whether J&D exceeded the scope of the Asset Purchase Agreement. The Asset Purchase Agreement was outside of Kathryn's authority.

Defendant finally argues that summary disposition should be affirmed on the alternative ground of res judicata. We disagree.

Res judicata is a judicially created doctrine intended to guard parties against multiple lawsuits, to conserve judicial resources, and to promote certainty. *Pierson Sand and Gravel, Inc*., *supra* at 380. It applies broadly in Michigan to bar subsequent actions between the same parties concerning issues that actually were, or reasonably should have been, addressed and decided in a prior action. *Id*. "The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v State*,

470 Mich 105, 121; 680 NW2d 386 (2004). Furthermore, the doctrine of res judicata "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id*.

Regarding the first element, this Court has held that res judicata applies to settlements and consent judgments. *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001). See also, *Rayl v Hammond's Estate*, 100 Mich 140, 146-148; 58 NW 654 (1894). Therefore, defendant is correct in asserting that res judicata is potentially applicable here, notwithstanding the fact that the original litigation was ended by mutual agreement among the parties rather than by a trial and judgment. The distinction is between an action that is resolved for substantive reasons, as opposed to purely procedural reasons. *Verbrugghe v Select Specialty Hosp*, 270 Mich App 383, 394-396; 715 NW2d 72 (2006). For the purposes of res judicata, a settlement by agreement of the parties is substantive, so the prior litigation was "decided on its merits."

Regarding the second element, it is undisputed that the actual parties to the instant litigation are not the same parties who were involved in the prior litigation. However, "a perfect identity of the parties is not required;" rather, "privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair*, *supra* at 122. In the prior litigation, Mark and Michael sued, in their individual capacities, for control of the Laethem businesses. In the instant litigation, the Laethem businesses are suing, in their own capacities, to recover assets that were allegedly wrongfully taken or to recoup damages allegedly sustained due to interference with their affairs. The sole shareholder of a corporation cannot sue in his own name on behalf of the corporation. *Randall v Dudley*, 111 Mich 437, 439-440; 69 NW 729 (1897). The interests involved in the prior action were limited to the individuals involved, and the interests involved here are limited to the corporations. Therefore, the parties are not identical and they are not in privity. The second element of res judicata is not met.

Related to the second element, the third element of res judicata, "whether the matter in the second case was or could have been resolved in the first," is to be determined by pragmatically. *Adair*, *supra* at 123-125. This entails assessing "whether the claims in the instant case arose as part of the same transaction as did the claims in" the prior action, "by considering whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit." *Id*., 125, quoting 46 Am Jur 2d, Judgments § 533, p 801 (emphasis added by the *Adair* Court omitted). The prior litigation was a dispute between siblings and co-trustees over ownership of the plaintiffs in the present litigation. It was therefore largely a "family affair" between individuals. Defendant argues that in the prior litigation, Mark and Michael were asserting rights on behalf of the Laethem businesses, but this is simply incorrect. The prior litigation was personal. More importantly, the prior litigation was over control of the Laethem businesses, which in turn governs *who can* assert rights on behalf of the corporations. As a pragmatic matter, the instant litigation, which is purely corporate, *could not* have been asserted until it was determined who owned the Laethem businesses. The third element of res judicata is also not met.

We therefore hold that the settlement agreement between the parties to the prior litigation did not bar any claims the parties thereto might have had against any individual or entity not a party thereto, and it did not itself convey ownership of the Laethem businesses or any assets thereof. We also hold that the Asset Purchase Agreement between Kathryn as sole trustee of the

Trust and as President of LEC was contrary to both her actual and apparent authority, and it was forbidden by the previous day's court order. Finally, we hold that although the prior action was decided on its merits, it is not res judicata as to the instant litigation.

Reversed and remanded. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio